We accordingly allow this appeal and quash the conviction and sentence.

Appeal allowed.

LUK DAI CHUNG v. NGU EE NGUOK

[A.C.J. (Lee Hun Hoe J.) September 16, 1965]

[Sibu — Civil Appeal No. 10 of 1965]

Practice and Procedure — Appeal — Question of fact — Principles governing.

Hwei — Claim against head of hwei — No default by any member.

In hearing an appeal from the decision of a judge sitting without a jury, involving questions of fact an appellate court is guided by certain principles. In *Watt* v. *Thomas* (1) Lord Thankerton stated thus: (1) where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; (2) the appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; (3) the appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.

This was an appeal against the decision of the magistrate dismissing the appellant's claim against the respondent, who was alleged to be the head of a "hwei". The appeal was based mainly on questions of facts. The respondent denied liability as she stated she had settled the amount claimed. It was not alleged that any member of the "hwei" had defaulted.

Held: there was no reason in this case to upset the decision of the magistrate who had held that the appellant had not established his claim on a balance of probabilities and who had the advantage of seeing and hearing the witnesses.

Cases referred to:—

(1) *Watt* v. *Thomas* [1947] 1 All E.R. 582, 587; [1947] A.C. 485, 487.

(2) *Tang Siew Hee and others* v. *Hii Sii Ung* [1964] M.L.J. 385.

(3) *Ngu Ee Nguok* v. *Lee Ai Choon* [1965] 1 M.L.J. 32.

(4) *Lee Pee Eng* v. *Ho Sin Leow* [1958] S.C.R. 18.

CIVIL APPEAL.

J. V. Nayar for the appellant.

Chong Siew Fai for the respondent.

Lee Hun Hoe J.: I dismissed the appeal with costs giving very brief reasons but intimated that reasons would be given more fully later.

There are four grounds of appeal. The last ground has no substance at all because the learned magistrate did not hold that respondent as head of the "hwei" was not liable for the debts owing from respondent to appellant. In fact he gave judgment for appellant for $100 in respect of a promissory note signed by the respondent. The first three grounds concern questions of fact.

In hearing an appeal from the decision of a judge, sitting without a jury, involving question of fact an appellate court is guided by certain principles. In *Watt* v. *Thomas* (1) Lord Thankerton in his speech stated thus:—

> "I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

Counsel for appellant contended that respondent did not specifically deny that as head of the "huei" she was not liable. He referred to Order 19 rule 13. Although the form of the amended defence as drafted left much to be desired the substance is clear. Appellant cannot say that he had in anyway been taken by surprise. In effect respondent denied liability for the simple reason that she had settled the amount claimed.

If I may say so the learned magistrate had critically examined the evidence adduced by both parties and had given full reasons for his findings on the facts. Cases, such as, *Tang Siew Hee & others* v. *Hii Sii Ung* (2) and *Ngu Ee Nguok* v. *Lee Ai Choon* (3) were referred to him and carefully dealt with by him.

Both counsel referred to my statement in *Ngu Ee Nguok* v. *Lee Ai Choon*:—

> "The view that if a member defaults the head may be held liable must depend on evidence adduced before the court. The onus is on the person who alleged that the head was liable, in this case the respondent."

Counsel for appellant made it clear that the question of default of any member did not arise in this case. If that were so I cannot see why respondent should be sued as head of the "hwei".

The action was started by Madam Ling Siew Nga but when she passed away Luk Dai Chung

as one of the administrators stepped in. The latter was the sole witness and was unable to give any direct evidence and merely relied on the pleading, certain promissory notes and respondent's limited admissions. It is therefore not surprising that the learned magistrate remarked as follows:—

"I have great sympathy with the administrator who gave his evidence with transparent sincerity but who with the unfortunate death of the plaintiff was deprived of the evidence of the person who could have given clear evidence as to the contract between her and the defendant. But this evidence has not been available and I must remind myself that the defendant could carry through settlements as head of 'hwei' without personal responsibility."

In short the learned magistrate held that the appellant had not established his claim on the balance of probabilities. I can see no fault with the finding of the learned magistrate who had the advantage of seeing and hearing the witnesses.

It seems that "hwei" cases in Sibu are coming to courts in increasing number. I would like to see legislation rendering cases of this nature being made unenforceable in courts. Perhaps I have expressed my sentiment stronger than what was stated by Williams C.J. at page 22 in *Lee Pee Eng* v. *Ho Sin Leow* [4]:—

"I should add, however, that I am not greatly in favour of actions taken in court which arise out of money loan associations. They are much better settled out of court. They depend for their success mainly on the element of trust. Apart from the case of *Soo Hood Beng* v. *Khoo Chye Neo, supra,* I can find no other reference to such cases in Singapore or Federation Reports. I have not heard of any such cases coming before the courts in Sarawak. There have been a few court actions on this matter in North Borneo recently. They were extremely rare in Hong Kong. Obviously Chinese prefer to settle disputes arising from such associations out of court. Here the defendant has been held liable because certain members were in default with their payments. As the agreement is between each member and the head and not between the members themselves, a member cannot usually sue another defaulting member so that the head becomes liable often, through no fault of his own. It is usual, I understand, among some Chinese in cases where a member absconds or defaults to adopt a principle of practical equity and the head is required to make good only one-half of what the defaulting member ought to have paid."

Appeal dismissed.

CHOCK KEK LING v. PATT HUP TRANSPORT CO. LTD. & ORS.

[O.C.J. (Raja Azlan Shah J.) September 25, 1965]

[Malacca — Civil Suit No. 50 of 1963]

Negligence — Duty of care to other road users — Contributory Negligence.

Damages — Ankle — Fracture and lacerated wound.

The plaintiff a passenger in a bus belonging to the first defendant and driven by the second defendant claimed damages for personal injuries sustained by him as a result of an accident between the bus and a lorry owned by the third defendant and driven by the fourth defendant. It appeared that the fourth defendant was driving the lorry and in order to avoid a heap of gravel on the road went to the crown of the road. The second defendant who was driving the bus in the opposite direction saw this but did not apply his brakes but drove on and as a result the accident took place. The plaintiff who was 11 years old at the time of the accident sustained a lacerated wound over the left ankle and a fracture of the ankle bone.

Held: (1) the fourth defendant was clearly negligent in going on to the crown of the road and thereby encroaching on the path of the oncoming bus;

(2) the second defendant was also to blame as he failed to take avoiding action;

(3) both the drivers were therefore to blame for the accident, the fourth defendant to the extent of 75% and the second defendant to the extent of 25%;

(4) in the circumstances the plaintiff was entitled to $2,500 for pain and suffering.

Cases referred to:—

(1) *Noor Mohamed* v. *Palanivelu* [1956] M.L.J. 114.

(2) *Government of Malaysia and another* v. *Kong Ee Kim* [1965] 1 M.L.J. 81 at p. 85.

(3) *London Passenger Transport Board* v. *Upsom* [1949] 1 All E.R. 60 at p. 70.

CIVIL SUIT.

H. B. Ball for the plaintiff.

F. K. Sellar for the 1st and 2nd defendants.

E. Joseph for the 3rd and 4th defendants.

Cur. Adv. Vult.

Raja Azlan Shah J.: On 13th May, 1961, at about 2.40 p.m. the plaintiff was travelling as a passenger in the first defendant's motor-bus M. 6398 driven by the second defendant from Masjid Tanah to Lubok China. He was seated immediately behind the driver's cabin and next to the off-side wall of the bus. At the 27¼ milestone, about 100 yards before entering Lubok China, the said bus met with an accident with an on-coming lorry NA. 3219 owned by the third defendant and driven by the fourth defendant.

As a result of the accident plaintiff sustained personal injuries. He now claims damages against all four defendants. He averred that due to the negligence of the second and fourth defendants or of either of them, the two vehicles came into violent collision. At the time of the accident the plaintiff was 11 years of age and was attending Masjid Tanah Chinese Primary School. He now sues through his next friend, his father.

The first and second defendants admitted that the accident did happen at the time and place in question but denied liability and averred that the accident was caused solely by the negligence of the fourth defendant as the servant or agent of the third defendant. The third and fourth defendants also admitted the accident but